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Supreme Court of the United States

OCTOBER TERM 1949

No. 495

ANHEUSER-BUSCH, INCORPORATED,
Petitioner,

against

DU BOIS BREWING COMPANY,
Respondent.

PETITION FOR REHEARING

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Anheuser-Busch, Incorporated, respectfully petitions the Court for a rehearing of its Petition for Writ of Certiorari in the above entitled case because:

Questions of General Interest and National Importance Are Involved.

First Question: **Whether the Court should now clarify its own decisions with regard to Rule 52(a) and enforce a uniform construction of the rule by all Courts of Appeal in view of recent decisions.**

Decisions of the court below and in other circuits since the filing of the petition for certiorari herein reveal continued, and even increasing divergence of opinion, as to the correct interpretation of the rule that findings of fact

"shall not be set aside unless clearly erroneous" and as to the effect of the Gypsum decision.[1] These decisions, cited infra, show that the situation has not been settled or clarified by the decision in the *Yellow Cab* case.[2] There is a serious need for clarification and this case is peculiarly well suited for this purpose. The two opinions below are obvious applications of conflicting concepts of the function and authority of a reviewing court. The question is substantial here because if the construction of the rules represented by the dissenting opinion had prevailed, the decree of the District Court would have been affirmed and it is of general importance because the division on the appeal in the present case is typical of divisions in the Courts of Appeal resulting from differences of point of view on this question.

Brown v. *Commissioner* (Third Circuit, decided February 28, 1950, 18 L. W. 2414) shows continued divergence on the scope of Rule 52(a), Judge Kalodner stating in the dissenting opinion:

> "The real issue here is the effect to be given by an Appellate Court to Rule 52(a), Federal Rules of Civil Procedure."

It seems clear that Judge Kalodner's conception of the scope of the Rule and the duty of the Court of Appeals was such that had he been sitting in this case instead of one of the majority below, he would have joined with Judge Goodrich in affirming the decree of the District Court. In the Third Circuit, therefore, decision on appeal depends upon which judges happen to be sitting.

In *Orvis* v. *Higgins*,[3] reported February 20th, the Second Circuit was again divided over the application of Rule 52(a). In the majority opinion, the findings of trial courts are

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[1] *United States* v. *United States Gypsum Co.*, 333 U. S. 364.

[2] *United States* v. *Yellow Cab Co.*, 338 U. S. 338.

[3] 13 Fed. Rules Service 52a.42, Case 7. A copy of the opinion of the court and of the dissenting opinion is annexed in the Appendix.

graded and the degree to which the Court of Appeals is required to conform with Rule 52(a) is held to vary in accordance with these gradations. The opinion states that this classification or grading of findings for purposes of review is made in the light of the *Gypsum* case, and that the decision of this Court in the *Yellow Cab* case did not modify what was said in the *Gypsum* case, and that in rejecting the trial judge's finding, the majority of the Court of Appeals differed from the trial judge "solely about the inference which may reasonably be drawn from the evidence". This, also, is the ground on which Judge Chase based his dissenting opinion.

The majority decision in the *Orvis* v. *Higgins* case clearly is a modification of the statutory provision in Rule 52(a). The same is true with respect to the *Princess Lida* case,[1] which has been the leading authority for substituting the word "incorrect" in the place of "clearly erroneous", and for qualifying, if not completely nullifying, the effect of Rule 52(a) where there is a choice between permissible inferences, and which has been cited in majority and in dissenting opinions (depending upon which point of view prevails in a particular case) in the various Circuits where there is a marked division of opinion.[2] In a recent decision in the Ninth Circuit, published since the filing of the petition for certiorari in the present case, Judge Yankwich cited the *Princess Lida* case as authority for the theory that "we may make our own inferences from undisputed facts on purely documentary evidence", and also represented this theory to be a corollary to the rule in the *Gypsum* case.[3]

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[1] *Kuhn* v. *Princess Lida of Thurn & Taxis,* 119 F. (2d) 705 (C. A. 3rd, 1941).

[2] See Petition for Certiorari, pp. 12, 53-54.

[3] *Pacific Portland Cement Co.* v. *Food Machinery & Chemical Corp.,* 178 F. (2d) 541, 548 (Dec. 2, 1949). See also recent relevant decisions in the Sixth and Eighth Circuits: *The Great Atlantic & Pacific Tea Co.* v. *Bradley,* 84 U. S. P. Q. 209 (C. A. 6th, Jan. 17, 1950), and *Brink's* v. *Hoyt,* 179 F. (2d) 355 (C. A. 8th, Jan. 17, 1950).

The Advisory Committee's notes on the Rules make it clear that the *Princess Lida* doctrine, which in the past nine years has been a frequent cause of division in the Courts of Appeals, and the *Orvis* v. *Higgins* doctrine of graded findings, which may become a further ground for conflict, are modifications by judicial decision of the provisions of the Statute. The Committee's note on Rule 52(a) states that it is "applicable to all classes of findings in cases tried without a jury * * *",[1] and in explaining the position of the Committee Mr. Mitchell pointed out that the rule applies "whether there is a conflict of evidence or whether there is a difference of opinion as to inferences that may be drawn from undisputed evidence. The notes to the rule make that clear".[2]

Recent decisions not only in the Second Circuit [3] but also in the Seventh Circuit [4] follow the rule laid down in prior Second Circuit decisions exempting findings relating to confusion in unfair competition cases from the application of Rule 52(a).[5] In numerous other recent decisions in the Seventh Circuit the rule with respect to the function of a reviewing court has been strictly applied and the court has refused to upset findings not found to be clearly erroneous and has held it to be the function of the trial court to decide as between reasonable inferences which one to draw.[6]

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[1] Proceedings of the Institute on Federal Rules, page 107.

[2] Ibid., page 318.

[3] *Speed Products Co.* v. *Tinnerman*, 179 F. (2d) 778, 780 (C. A. 2, Dec. 14, 1949).

[4] *Albert Dickinson Co.* v. *Mellos Peanut Co.*, 179 F. (2d) 265, 269 (C. A. 7, Jan. 12, 1950).

[5] *LaTouraine Coffee Co.* v. *Lorraine Coffee Co.*, 157 F. (2d) 115, 117 (C. A. 2nd, 1946); *Best* v. *Miller*, 167 F. (2d) 374, 377 (C. A. 2nd, 1948).

[6] *Insurance Co.* v. *Midwest Transfer Co.*, 178 F. (2d) 191 (C. A. 7th, Dec. 7, 1949); *Chicago & Northwestern Rwy.* v. *Froehling Supply Co.*, 179 F. (2d) 133, 135 (C. A. 7th, Jan. 19, 1950); *Moths* v. *United States*, 179 F. (2d) 825 (C. A. 7th, Feb. 2, 1950); *Dearborn National Casualty Co.* v. *Consumer Petroleum Co.*, 178 F. (2d) 277 (C. A. 7th, Dec. 8, 1949), and *Small* v. *Schultz*, 180 F. (2d) 351 (C. A. 7th, Feb. 10, 1950).

Second Question: **Whether a second comer who through laches becomes entitled to use another's trade-mark with a qualifying term thereby acquires the right to use the other's trade-mark without such qualifying term, even where actual deception of the public results.**

This question does not involve factual issues and is not complicated.

The court below holds that long use by a second comer of a secondary meaning mark ("Budweiser") with a qualifying term ("DuBois") which is itself separately indicative of origin justifies the second comer in using the mark ("Budweiser") without the qualifying term ("DuBois") and even in conjunction with the word "original" and other false statements. A second comer may have a right to use a secondary meaning mark with a qualifying term for various reasons of public policy—here it is because of plaintiff's delay in suing to enjoin "DuBois Budweiser"; in other cases it may be because it is the second comer's surname or a descriptive term. But may he drop the qualifying term and masquerade as the original?

This question is of general interest and national importance because it undermines the fundamental and settled law of trade-marks and unfair competition and fails to protect the public from deception.

This entire case involves only two main issues:

1. Is respondent entitled to continue to use, in some undefined local territory, the term "DuBois Budweiser"?

2. Is respondent entitled to continue, in such local territory, its recent sales campaign of invoicing its beer as "Budweiser" simpliciter and representing that it may be sold without explanation on calls for "Budweiser" simpliciter and making the other false statements and representations listed in the petition such as that respondent's beer is the "Original Budweiser" and that respondent and petitioner have been or are connected?

The first main issue involves the factual issues of

(a) petitioner's laches

(b) whether respondent changed its position in reliance on plaintiff's laches

(c) whether respondent acted with an actual fraudulent intent, either in the beginning or more recently, and was for that reason barred from relying on estoppel even if it had changed its position.

These factual issues involve the propriety of the action of the court below in disregarding Rule 52(a) and setting aside the findings of fact of the District Court.

But the second main issue does not involve those factual issues or Rule 52(a), and is not complicated or difficult.[1] It involves neither (a) laches, because respondent's sales campaign was of recent origin; nor (b) change of position or estoppel, because respondent's change of position as the court below held was based on a "good will in Dubois Budweiser" not in "Budweiser" simpliciter or in making collateral misrepresentations; nor (c) fraud, because under Pennsylvania law[2] acts of unfair competition as to which

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[1] (a) Respondent was concededly a second comer, and the court below assumed that petitioner's trade mark "Budweiser" had acquired a secondary meaning (R. 5321); (b) Respondent's use until its recent sales campaign was of the combination term "DuBois Budweiser", not "Budweiser" simpliciter, and the holding of the court below is merely that respondent acquired "a good-will in the name 'DuBois Budweiser'" (R. 5325); (c) "Budweiser" simpliciter as found by the District Court in a finding not reversed by the court below, identified petitioner's beer, and that fact was conceded by the respondent's own president in his testimony regarding the word "Budweiser" simpliciter. "It means the product of Anheuser-Busch" (Petition, p. 33).

[2] Under Pennsylvania law, defendant's conduct in using "Budweiser" simpliciter and "Original Budweiser", and falsely claiming a present or former connection with petitioner were actionable irrespective of fraudulent intent (see cases cited in Petition, p. 42, and Petitioner's Brief, pp. 70-72).

there is no laches are actionable and will be enjoined irrespective of any actual fraudulent intent.

These two main issues, therefore, depend on entirely different considerations and the action of the court below in denying relief to petitioner on the second issue was not only contrary to law and an injustice to petitioner, but lays down a rule that imperils the rights of trade-mark owners generally and opens the door to gross deception of the consuming public.

It is well settled by decisions of this Court and the Courts of Pennsylvania, that a second comer who for some reason of public policy has the right to use a mark must, in order to minimize confusion, distinguish by using a qualifying term or phrase.[1] There is no authority, except the decision below, that the second comer may discard the qualifying term, and masquerade as the original.

The petition for writ of certiorari should be reconsidered.

Respectfully submitted,

WALLACE H. MARTIN,
MINTURN DE S. VERDI,
WALTER J. HALLIDAY,
Counsel for Petitioner.

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[1] *Davids* v. *Davids*, 233 U. S. 461 (1914); *Howe Scale Company* v. *Wyckoff*, 198 U. S. 118 (1905); *Baglin* v. *Cusenier Co.*, 221 U. S. 580, 601 (1911); *Herring etc. Safe Co.* v. *Hall*, 208 U. S. 554, 559 (1908); *Singer* v. *June*, 163 U. S. 169, 187 (1895); *Ralph Bros. Furniture Co.* v. *Ralph*, 338 Pa. 360; *Seligman* v. *Fenton*, 286 Pa. 372.

Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and the grounds are confined to intervening circumstances of substantial or controlling effect or to other substantial grounds available to petitioner although not previously presented.

Dated: April 24, 1950.

WALLACE H. MARTIN,
MINTURN DE S. VERDI,
WALTER J. HALLIDAY,
Counsel for Petitioner.

APPENDIX

Orvis v. Higgins

U. S. Court of Appeals, Second Circuit, February 2, 1950
13 Fed. Rules Serv. 52a.42, Case 7; — F. (2d) —

52a.42 SCOPE OF REVIEW OF FINDINGS OF FACT.

Where a trial judge, sitting without a jury, decides a fact issue on written evidence alone, the reviewing court is as able as he to determine credibility, and may disregard his findings. Where the evidence is partly oral and the balance is written or deals with undisputed facts, the reviewing court may ignore the trial judge's findings and substitute its own if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance. Where the evidence supporting the trial judge's finding as to any fact issue is entirely oral testimony, the reviewing court may disturb that finding only in the most unusual circumstances. Evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge's finding. Where the only question was as to inferences to be drawn from evidence assumed to be truthful, the appellate court reversed on the ground that a "clear mistake" had been made.

Appeal from the United States District Court for the Southern District of New York. Before AUGUSTUS N. HAND, CHASE and FRANK, Circuit Judges.

[Action against a Collector of Internal Revenue.]

The facts appear in the opinion of the district judge. 80 F. Supp. 64. The government has abandoned the defenses

that the five trusts created in 1932 were made in contemplation of death. The appeal therefore relates solely to the 1934 trust, as to which the government now asserts but two defenses: (1) the "reciprocal-trusts" defense and (2) the "contemplation-of-death" defense.

FRANK, C. J. In opinions holding that the findings of trial judges were not "clearly erroneous" within the meaning of Rule 52 (a),[1] we have often stressed the importance of a trial judge's advantage over us when he saw and heard the witnesses as they testified. We have pointed out our inability to appraise the cogency of demeanor evidence lost to us because it cannot be captured in the witness' words as recorded on paper.[2] In so holding, we may perhaps, at times, have overlooked distinctions described in United States v. Gypsum Co., 333 U. S. 364, 394-396.

There the Court made it clear that Rule 52 (a) merely adopted the equity practice then prevailing in the federal courts.[3] The Court said, a finding of a trial court, if it be by a judge, "is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." The Court pointed out that a trial judge's finding does not have the dignity which jury verdicts derive from the Constitution nor the dignity which some statutes confer on findings of some administrative agencies.

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[1] And, correspondingly, in admiralty cases.

[2] See, *e.g.*, Petterson Lighterage & T. Corp. v. New York Central R. Co., 126 F. (2d) 992, 994-996 (C. A. 2); Morris Plan Industrial Bank v. Henderson, 131 F. (2d) 975, 977 (C. A. 2); U. S. v. Aluminum Co. of America, 148 F. (2d) 416, 433 (C. A. 2); Broadcast Music Inc. v. Havana Madrid Restaurant Corp., 175 F. (2d) 77, 80 (C. A. 2).

[3] For an excellent summary of the practice and its history, see Ilsen and Hone, Federal Appellate Practice, in the volume, Federal Rules of Civil Procedure (1947 Rev. Ed., West Pub. Co.) 359, 416-417.

We think that United States v. Yellow Cab Co., 338 U. S. 338, did not modify what was said in the Gypsum case. In Gypsum, an anti-trust action, the defendants testified orally that they had not acted in concert, and the trial judge so found. The Supreme Court rejected that finding, remarking that "The witnesses denied that they . . . had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight. . . ." In Yellow Cab, where the Court affirmed the trial judge's findings against the government in an anti-trust action, the oral testimony was not incompatible with inferences which could reasonably be drawn from the documentary evidence.[4]

[52a.42] In the light of the Gypsum case, we may make approximate gradations as follows: (1) We must sustain a general or a special jury verdict when there is some evidence which the jury might have believed, and when a reasonable inference from that evidence will support the verdict, regardless of whether that evidence is oral or by deposition. (2) In the case of findings by an administrative agency, the usual rule is substantially the same as that in the case of a jury, the findings being treated like a special verdict.[5] (3) Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) if he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding.[6] (b) Where the evidence is partly oral and the

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[4] For the evidence in the Yellow Cab case, see discussion in the opinion of the trial court in that case, 80 F. Supp. 936.

[5] See, *e.g.*, N. L. R. B. v. Universal Camera Corp., — F. (2d) — (C. A. 2, January 10, 1950).

[6] Luckenbach S. S. Co. v. U. S., 157 F. (2d) 250, 251 (C. A. 2); Kind v. Clark, 161 F. (2d) 36, 46 (C. A. 2); The Coastwise, 68 F. (2d) 720, 721 (C. A. 2); Stokes v. U. S., 144 F. (2d) 82, 85 (C. A. 2); Norment v. Stilwell, 135 F. (2d) 132 (C. A. 2); Pfeifer Oil Trans. Co. v. The Ira S. Bushey, 129 F. (2d) 606, 607 (C. A. 2); Bowles v. Beatrice Creamery Co., 146 F. (2d) 774, 780 (C. A. 10); Equitable Life Assur. Soc. v. Irelan, 123 F. (2d) 462, 464 (C. A. 9).

balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful,[6a] or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance.[6b] (c) But where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that find- only in the most unusual circumstances.[6c]

It follows that evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge's finding.[7] So in the instant case, perhaps, on the record evidence, we might have affirmed a jury's verdict or an administrative agency's finding in plaintiff's favor. That, however, we need not decide. For here the finding is that of a trial judge, and the evidence consists in large part of facts neither side disputes, in circumstances such that the trial judge's evaluation of credibility becomes unimportant. In short, for reasons we shall state, the undisputed facts are such that we have a "definite and firm conviction" that the trial judge was mistaken in finding that Orvis and Mrs. Orvis "each pursued an independent course" in creating the 1934 trusts, and that no reciprocity was intended. We therefore hold that finding "clearly erroneous", and hold, rather, that each of those trusts was made in consideration of the other.

[6a] See the Gypsum case.

[6b] E. F. Drew v. Reinhard, 170 F. (2d) 679, 684 (C. A. 2); Daitz Flying Corp. v. United States, 167 F. (2d) 369, 371 (C. A. 2).

[6c] See Broadcast Music Inc. v. Havana Madrid Restaurant Corp., 175 F. (2d) 77, 80 (C. A. 2).

[7] A wag might say that a verdict is entitled to high respect because the jurors are inexperienced in finding facts, an administrative finding is given high respect because the administrative officers are specialists (guided by experts) in finding a particular class of facts, but, paradoxically, a trial judge's findings have far less respect because he is blessed neither with jurors' inexperience nor administrative officers' expertness.

In so holding we assume that, because of the "evanescent factor which cannot come before us" [7a]—*i.e.*, the demeanor of the witnesses—the trial judge fully believed everything they said. Even so, there is nothing in the testimony which in any manner offsets what we believe to be the virtually irresistible inference drawn from the undisputed facts. To offset that inference, the trial judge relied on no positive testimony that Mr. and Mrs. Orvis acted independently but relied merely on negative testimony as to the absence of an expressed intention to act reciprocally, *i.e.*, that "no witness even intimated that the decedent acted with Mrs. Orvis' intention in mind or she with his." But those same witnesses, unequivocally and without contradiction by any other witnesses, testified to the following facts which we think can lead to but one reasonable conclusion: Mr. Orvis, in the Fall of 1934, spoke to his son, Warner, about creating a trust. Subsequently, in November 1934, Mrs. Orvis also spoke to Warner about creating a trust. He told his mother that Mr. Orvis had been looking into the subject of trusts and had already talked to his lawyer, Merritt, about his own proposed trust. Mr. Orvis thereafter talked to his wife about her proposed trust. On the advice of Warner, Mrs. Orvis also consulted Merritt, concerning her trust, in November, at the Orvis apartment; Mr. Orvis was then in the apartment, and may "have stepped into the room . . . and stayed for a minute." There was not, Merritt testified, "any secretiveness by her" with respect to her intention to create a trust. The only testimony on which the trial judge relied, or could have relied, to counterbalance the foregoing is that of Mr. Merritt as to the reasons respectively given to him by husband and wife for the creation of their respective trusts. Not only were those respective reasons strikingly similar but none of them sufficed or purported to explain why each of the trusts set up a life estate: nor did the expression of those reasons at all negative the

[7a] See E. F. Drew & Co. v. Reinhard, 170 F. (2d) 679, 684 (C. A. 2).

existence of an intent to make the trusts reciprocal. The finding of an absence of such an intention must, then, depend not on an inference drawn from anything positive in the testimony concerning statements of intention made by Mr. and Mrs. Orvis, but on an inference from their conduct. And that inference, in turn, must rest on a belief in the purely chance concurrence of several events, although the coincidental occurrence of those events would ordinarily be highly improbable.[8] Such a belief ought not to be the foundation of a trial judge's finding on a fact issue, in favor of that side having (like plaintiffs here) the burden of proof as to that issue, unless the purely chance character of those events is positively confirmed by clear evidence.[8a] There is no such confirmatory evidence here.

In rejecting the trial judge's finding, we do not, therefore, reject his estimate of the credibility of any orally testifying witnesses. We differ from him solely about the inference which may reasonably be drawn from the evidence, assuming without question that the witnesses he credited spoke the truth.[9] In a case like this, on an issue relating to intention, what we said in E. F. Drew & Co. v. Reinhard,

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[8] For a convenient collection of citations of, and quotations from, authorities on the subject of improbabilities and coincidences that excessively stretch credulity, see Old Colony Bondholders v. N. Y. N. H. & H. R. Co., 161 F. (2d) 413, 444 (C. A. 2).

See also Kind v. Clark, 161 F. (2d) 36, 45 (C. A. 2); E. F. Drew & Co. v. Reinhard, 170 F. (2d) 679, 683 (C. A. 2); Chamberlain v. Ward, 21 How. 548, 569; List Pub. Co. v. Keller, 30 F. 772, 774; Vreeland v. Vreeland, 53 N. J. Eq. 387, 393, 32 Atl. 3, 5-6; cf. Sharpe v. Crispin, L. R. 1 P. 611, 620.

[8a] Cf., *e.g.*, Smith v. Davis, 34 F. 783, 784; Morison v. Dominion Nat. Bank, 192 S. E. 707, 711 (Va.); Szpyrka v. International Railway Co., 213 App. Div. 390, 393-394; The Cedarhurst, 42 F. (2d) 139, 141 (C. A. 2).

[9] Cf. J. S. Tyree Chemist & Thymo Borine Laboratory, 151 F. (2d) 621, 624 (C. A. 7); U. S. v. Anderson & Co., 119 F. (2d) 343, 346 (C. A. 7); Kuhn v. Princess Lida of Thurn & Taxis, 119 F. (2d) 704, 705-706 (C. A. 3).

170 F. (2d) 679, 684 (C. A. 2) is applicable: "When an appellate court is faced with that question, it is in substantially as good a position to answer it as the trial judge, provided it accepts as true all the oral testimony as we do here, so far as it was relevant. We yield to findings of facts, so far as those parts of the evidence which cannot come before us may have controlled their decision; we must assume that these evanescent factors may have been persuasive, unless what does come before us rationally forbids the conclusions, no matter what the unknown factors were. After giving them every possible probative force they might have, our problem therefore becomes the same as that before the trial court."

Since we find that reciprocity was intended, the situation is just as if Mr. Orvis had been the settlor of the 1934 trust created by his wife.[9a] That trust must, then, be regarded as one he made in which he retained a life income. His estate is therefore subject to tax on the value of the corpus of that trust, *i.e.*, $250,466.46.[10]

. . . . . .

Reversed and remanded.

CHASE, C. J. (dissenting). I cannot agree with my brothers that these findings are "clearly erroneous." The trial judge saw and heard witnesses who testified concerning matters which had a direct tendency to explain plausibly how these two trusts might have been created when, and as, they were without any so-called "reciprocal" taint. That judge, as his reasoned opinion shows, believed them and gave effect to their testimony in weighing all the relevant facts proved. His findings support the judgment and those findings, as this record unmistakably shows, are the

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[9a] Lehman v. Commissioner, 109 F. (2d) 99 (C. A. 2); Hanauer's Estate v. Commissioner, 149 F. (2d) 857 (C. A. 2); Cole's Estate v. Commissioner, 140 F. (2d) 636 (C. A. 8).

[10] I. R. C. § 811 (c).

result of a careful study of evidence which he might reasonably believe, and believing, might reasonably use as the basis for drawing the inferences he did.

This is a typical instance for the application of Civil Rule 52 (a). Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient.

I would affirm.